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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-68

MAGGIE BAILEY, ... Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE, ... Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

WILLIAM R. BAGBY,
1107 First National Building,
Lexington, Kentucky 40507
Counsel for Petitioner.

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. ———

MAGGIE BAILEY, - - - - - *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case.

OPINIONS BELOW.

The per curiam opinion of the Court of Appeals (Appendix A, infra, p. 33) is reported at 439 F. 2d 723 (1971). The opinion of the United States Tax Court is reported at 29 TCM 272 (1970).

JURISDICTION.

The judgment of the Court of Appeals was entered on April 27, 1971 (Appendix A, *infra*, p. 34). Petition for Rehearing was denied May 28, 1971 (Appendix A, *infra*, p. 34). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED.

1. Where there was a county search warrant for the search of taxpayer's residential-business premises for alcoholic beverages in violation of state law but where the taxpayer was not present, not operating the business, and not served—but where the warrant was served on taxpayer's brother who was operating the business—and where three state highway troopers, at the end of their search for alcoholic beverages under the search warrant, discovered a large quantity of taxpayer's money (her lifetime savings) in a locked footlocker in a locked cabinet—and where the three state officers were then advised by telephone by the county judge who issued the search warrant to call the county attorney and where they were advised by the county attorney to leave the money alone as it was not covered by the search warrant—and where the three state troopers, having completed their search under the search warrant, then made an exploratory search for evidentiary materials by the seizure and count of the taxpayer's money, acting under claim and guise of the Federal authority of the Internal Revenue Service,

in the hope that evidence of a Federal income tax crime might be found—and which evidentiary materials with respect to the count and total of the money they took into custody and delivered to the Federal Internal Revenue Service—

Was there any reason to suspect or probable cause for the three state highway troopers to believe that the taxpayer was in violation of any Federal criminal income tax law?

And was not this an unreasonable search and seizure making the evidentiary materials inadmissible to establish the fraudulent intent by the taxpayer to evade taxes in a United States Tax Court civil, quasi-criminal income tax trial, where there was a timely objection by the taxpayer?

2. Where the Commissioner of Internal Revenue affirmatively alleged in its United States Tax Court pleadings that the taxpayer was guilty of fraudulent intent to evade income taxes and, as proof of this fraud, further affirmatively alleged that the taxpayer had an estimated $200,000 cash on hand at December 31, 1963—and where the estimated $200,000 was based on the alleged count on February 18, 1965 of $206,909 by three state troopers of money in taxpayer's footlocker in her residence during a raid on her residence for alcoholic beverages in violation of Kentucky law which raid was during taxpayer's absence—and where the taxpayer was not asked on direct examination during the Tax Court trial any question about the troopers' count of her money in the footlocker or how much money she had in the footlocker when the troopers

opened it or how much she counted from the footlocker when she returned home two days after the troopers' raid and after their alleged count of the money—but where the government questioned the taxpayer on cross-examination about the amount of money she had in the footlocker upon her return home and where she then testified that she had about $116,000—

Did this open the door for the evidence illegally seized by the state troopers and allow the testimony of the alleged count by the troopers and of the $206,909 they claimed they counted, over the timely objection of the taxpayer?

3. Assuming *arguendo* that the search and seizure of the taxpayer's money was made by the three state troopers under the authority of the county search warrant for alcoholic beverages—where, in the affidavit for the search warrant, the *first* of these three state troopers stated that he had *information* from a *civilian* that the *civilian* had made a purchase of *legal-taxed* alcoholic beverages from the taxpayer's business-residential premises in violation of State law—but where the testimony, in a United States Tax Court trial, by the *second* state trooper was that the *third* state trooper had made the purchase of the alcoholic beverages for the search warrant—and where the search warrant authorized a search and seizure of illegal *untaxed,* spirituous and intoxicating liquors, or illicit *stills*—

Was not the search warrant void, the search and seizure unreasonable, and the evidence inadmissible to establish the fraudulent intent by the taxpayer to evade taxes in a United States Tax Court civil, quasi-

criminal income tax trial, where there was a timely objection by the taxpayer?

4. Where a primary factual question in a Federal civil income tax trial was whether or not the taxpayer had $206,909 in cash on February 18, 1965—

Was not the record so devoid of evidentiary support as to render the decision unconstitutional under the Due Process clause of the Fifth Amendment?

AMENDMENTS TO THE CONSTITUTION AND RULES OF CRIMINAL PROCEDURE INVOLVED.

The Constitutional Amendments involved are the Fourth and Fifth and are in Appendix B, *infra,* p. 35. Reference is made to Rule 41 of the Federal Rules of Criminal Procedure, in Appendix B, *infra,* pp. 35-36.

STATEMENT.

The taxpayer-petitioner is a scantily educated, poorly lived woman, born in 1904 (R. 71a, 153a, 189a-193a, 219a, 229a-233a, 375a, 376a). She was reared on a farm in a remote and rugged mountain coal mine area of Kentucky (R. 190a, 192a, 193a). At the age of 16, she moved 25 miles and found work in the town of Harlan, Harlan County, also deep in the Kentucky coal-mine mountain area; where she has since continued to reside most of the time (R. 142a, 189a, 192a, 193a, 197a, 202a, 370a).

From July, 1945, through 1964 the taxpayer engaged in the business of selling legal taxed alcoholic beverages at her home, a semi-shack located in a sec-

tion of poor people at the outskirts of Harlan, which was dry territory (R. 154a, 177a, 186a, 189a, 202a, 205a, 206a, 371a). Kentucky statutes forbade the selling or having possession for sale of alcoholic beverages in a dry territory (R. 177a, 224a). The taxpayer however always had a Federal tax stamp to sell alcoholic beverages and operated a respectable place with never any disturbances (R. 182a, 202a, 203a, 285a).

During early January to mid-March 1965, the taxpayer did not operate the business, as she was in Louisville, Kentucky, attending her sister with terminal cancer (R. 224a, 225a, 250a, 252a, 253a, 261a). During this period, taxpayer's brother Tyree Davidson operated the business (R. 115a, 127a, 261a, 286a, 333a, 334a).

On February 18, 1965 for a search warrant of taxpayer's home, Kentucky state trooper George Mayberry made an affidavit before the Harlan County Judge that he had "information" from a "Charles Young" that he, Charles Young, had purchased taxed alcoholic beverages on February 17, 1965, at the residence of the taxpayer (R. 116a). Receiving trooper Mayberry's affidavit, the county judge issued a search warrant for "illegal liquor" which stated that a search could be made of the taxpayer or her premises for "untaxed" alcoholic beverages or "stills" (R. 114a, 115a). Under this warrant a raid on taxpayer's home was made on February 18, 1965, by nine state troopers with trooper James Cromer in charge (R. 125a, 126a, 127a, 261a, 320a, 351a). Since the taxpayer was not present operating the business but was in Louisville,

the search warrant was not served on her but on her brother, who was operating the business R. 115a, 224a, 225a, 261a, 281a, 282a, 285a, 286a, 333a).

At the end of their search of taxpayer's home for alcoholic beverages, trooper-in-charge James Cromer and troopers George Mayberry and Roy Lindsey found a locked home-made closet in her bedroom (R. 266a, 271a, 313a, 321a, 322a, 323a, 49, 50, 51). Upon forcing it open they found a padlocked footlocker (R. 131a, 266a, 322a, 353a). The taxpayer had the only key to the footlocker (R. 313a). Trooper Cromer had seen the footlocker on prior raids of the taxpayer's home, having made 24 such raids from July, 1957 until February 18, 1965 (R. 278a-280a, 300a).

The troopers smashed the padlock on the footlocker and found in it 4 or 5 sized 8 pound brown paper grocery bags and a small jewelry box which was also locked, an old sock or plastic bag and a 1948 newspaper (R. 131, 270a, 296a, 325a-329a, 337a). The troopers opened the paper bags, the sock and the old newspaper and smashed the lock on the small jewelry box and found in them United States paper money (R. 323a, 353a). Also in the footlocker was an American flag in a plastic bag and Army medals and ribbons of taxpayer's brother-in-law killed in World War II (R. 131a, 191a, 269a, 323a, 337a, 343a, 361a, 52). The troopers found however no alcoholic beverages in the footlocker (R. 269a, 323a, 324a, 52). The money in the footlocker was the taxpayer's lifetime savings plus savings of her sister and mother (R. 244a, 245a, 258a, 259a, 371a).

The warrant did not have a provision for the search and seizure of the money; but trooper Cromer was determined to carry it away (R. 114a, 131a, 266a, 272a). He did not as a rule seize and count money on such raids (R. 291a). Therefore, having completed the search and seizure under the search warrant for alcoholic beverages and realizing that there was no provision for the raid of the taxpayer's money and recognizing his limitations on seizure of the money, trooper Cromer telephoned the county judge, who had issued the search warrant, and told him he had found a very large quantity of money and asked for advice about seizure (R. 262a, 266a, 292a, 326a). The county judge would not pass judgment on the matter and referred Cromer to his official legal advisor, the county attorney (R. 266a, 284a). The county attorney advised trooper Cromer that the money was not covered by and had no connection with the search warrant for alcoholic beverages; and advised that there were no grounds for seizing it and to leave the money alone (R. 131a, 143a, 144a, 325a).

Since all authority under the search warrant for seizure of the money was then closed to trooper Cromer via the magistrate under whose authority he was acting, Cromer decided to go outside the scope of the authority of the search warrant and to seek Federal authority to seize the money (R. 266a, 284a). Trooper Cromer knew that the taxpayer had a Federal tax stamp to sell alcoholic beverages (R. 289a). He did not telephone or consult with a Federal alcohol tax agent but did telephone and consult with a local Fed-

eral Internal Revenue income tax agent, who advised that he could not authorize trooper Cromer to seize and carry away the money but this Federal agent did request Cromer to advise him the next day as to the total amount of the money (R. 131a, 266a, 267a, 284a, 285a, 325a, 168a, 172a). No further effort was made by trooper Cromer to carry the money away from taxpayer's residence (Entire Record).

When cross-examined as to why he reported the finding of the money to the Federal Internal Revenue Service, trooper Cromer said that he thought that the money was evidentiary material for a violation of Federal law, testifying as follows (R. 284a):

> "Q. Why did you report it to the Revenue Service?
>
> A. I felt the money was the direct result of the bootlegging business and therefore felt it was seizable and I was advised *not* to seize it. *I thought it was a violation of the Federal law.*" (Emphasis supplied.)

After his discussion with the local Federal Internal Revenue income tax agent, trooper Cromer announced that he was going to count the money (R. 325a, 326a). He did not ask for nor was he given permission to count the money (R. 324a). To the contrary, the taxpayer's brother Tyree Davidson protested any counting of the money and questioned the trooper's authority to pry into the taxpayer's personal things (R. 324a). In reply to the brother's questioning of his authority, trooper Cromer advised that he was counting the money for the Internal Revenue Service (R. 324a). Trooper Cromer

later repeated that he was counting the money for the Internal Revenue Service (R. 360a). That was the only evidence that the Federal Internal Revenue income tax agent instructed Cromer to explore for evidentiary materials for a Federal income tax violation and to seize and keep possession of the money long enough to count it (R. 324a, 325a, 360a).

With the aid of troopers Lindsey and Mayberry, trooper Cromer seized the money, had it removed from the footlocker, and placed on a table in taxpayer's living room (R. 266a, 267a, 268a, 324a, 51). Taxpayer's brother again asked trooper Cromer what right they had to count the money and Cromer replied again that they were counting it for the Internal Revenue (R. 325a). Thereupon the three troopers engaged in an alleged count of the money from the footlocker with troopers Mayberry and Lindsey doing the counting and with trooper Cromer making a tally of the count (R. 268a). The taxpayer's brother and a once-a-week woman housecleaner, being the only other persons present at taxpayer's home when the raid began, were allowed to remain in the room as observers during the alleged count (R. 132a, 268a). Since three troopers of the nine raiders had departed, the other three remaining troopers were stationed by trooper Cromer outside on the premises for the purpose of keeping civilians outside the house during the alleged money count (R. 132a, 272a).

At the time the count of the money began, the search for evidence of alcoholic beverage violations under Kentucky law had been completed and resulted in the

troopers' finding and seizure of legal taxed alcoholic beverages worth about $99.60 but they found no untaxed alcoholic beverages (R. 129a, 130a, 271a, 272a, 326a).

After engaging in their exploratory search for evidentiary materials for a Federal income tax violation and having possession of the money for about an hour and 45 minutes or two and one-half hours, the troopers released it, leaving it with the taxpayer's brother and departed taxpayer's home (R. 132a, 271a, 342a). Although trooper Cromer and the others carried away and delivered the alcoholic beverages to the Harlan County Judge, they did not carry away and deliver the money to any magistrate, State or Federal (R. 129a, 130a, 273a). However, trooper Cromer carried away the evidentiary materials which he had gathered in his exploratory search, which included the tally he made of the alleged money count by troopers Lindsey and Mayberry (R. 117a-122a, 131a, 133a, 273a). He did not leave a copy of the tally with the taxpayer's brother or advise him of the total of the money allegedly counted (R. 342a, 344a, 358a). The evidentiary materials, the tally or a copy of his official state report about the finding of the money were not delivered to the county judge by trooper Cromer (R. 114a, 115a, 129a, 130a, 292a).

The next day after the raid, February 19, the taxpayer's brother was charged in county court, not with possession of untaxed alcoholic beverages but with the illegal possession and sale of alcoholic beverages in a dry territory under Kentucky statutes and was fined

$50.00 and given a 30-day suspended jail sentence[1] (R. 126a, 128a).

The departure of trooper Cromer and the other troopers from taxpayer's home was at night on February 18 (R. 271a, 326a). The next morning on February 19 the Federal internal revenue income tax agent, with whom trooper Cromer had consulted during the raid went to trooper Cromer at his Post to secure the evidentiary materials as to the taxpayer's money and trooper Cromer furnished this Federal officer with all available information about the money (R. 133a). In the afternoon of February 19, another local Federal Internal Revenue agent requested trooper Cromer for surveillance of the taxpayer's home until a lien could be placed against the property (R. 133a). Surveillance was maintained of taxpayer's residence by the state trooper from 6 p.m. on February 19 until 8:20 a.m. on February 20, when Internal Revenue Service officers arrived at the residence (R. 133a). The troopers reported there was no activity noted at taxpayer's home, which could be interpreted as being connected with the money (R. 133a).

Further on February 19, the Federal Commissioner of Internal Revenue levied against the taxpayer a

[1]The woman housecleaner was the only person arrested. Having finished her day's work, she was sitting on a couch in taxpayer's living room when the state troopers arrived for their raid (R. 351a). Trooper Lindsey asked her to move from the couch to look under the cushions. Under her cushion was a revolver. In spite of her statement that it was not hers and that she did not know it was under the cushion and, in spite of the fact that she was not carrying the pistol, Trooper Lindsey placed her under arrest for carrying a concealed deadly weapon. She was forced to empty her apron pockets. She made bond the next day after a preliminary hearing and was bound over to the grand jury but the case never left the grand jury (R. 272a, 273a, 280a-282a, 335a, 336a, 352a, 357a).

jeopardy assessment of income tax of $429,528,25 and *fraud* penalty of $214,765.13 and interest of $21,758.84 due for 1963 only (R. 66a, 169). A Federal revenue income tax agent from Louisville was assigned in charge of the examination of the taxpayer and was given the details by his supervisor of the police raid on taxpayer's premises and the cash found in the raid (R. 66-71, 79, 88). This agent made his first trip to Harlan on February 25 accompanied by two special *fraud* agents, and thus began a most intensive net worth investigation by many Federal agents of the taxpayer's financial condition, her business operations for the years 1942 through 1963 and all matters pertaining to the search of taxpayer's home and the counting of the money (R. 70-73, 86, 88, 90, 91).

The evidentiary materials which Cromer had gathered during the exploratory search, including his tally of the alleged count, were made available early to the Federal agent assigned to examine the taxpayer (R. 117a-122a, 308a, 79).

The examining Federal agents not only consulted early with the state police but examined public records, examined court house real estate and mortgage records, examined tax assessors' records and contacted county sources and county officials (R. 72, 73). The agents made other trips to Harlan (R. 70, 91). Two revenue agents permanently stationed in Harlan assisted in the examination (R. 70, 90). All the Federal agents spent a total of 538 hours on their examination of the case (R. 86).

In 1941 the taxpayer plead guilty and was sentenced in Federal District Court at London, Kentucky, which was nearby Harlan, Kentucky, for possessing untaxed whiskey (moonshine); and after this experience she never again sold untaxed whiskey or moonshine[2] (R. 87a, 202a). Until the taxpayer, herself, brought forth the evidence at the Tax Court trial on April 23, 1969 of this conviction, the Commissioner of Internal Revenue and his income tax agents, in the instant case, had no knowledge of it (R. 306a). Her living expenses, during a period of her incarceration, were charged to her as income by the examining revenue agent (R. 19a, 306a).

As required by the Internal Revenue Code, the Commissioner on April 14, 1965 mailed a statutory notice to the taxpayer however this notice covered the years 1942 through 1963 and the income taxes therein were $101,630.40 and 50 per cent *fraud* penalties were $50,952.69 with other penalties of $17,808.85. (R. 13a, 15a). The statutory notice was based on a net worth computation of income, which in turn was based on a cash total of $206,909 which in turn was based on the tally by trooper Cromer, resulting from the alleged count made by troopers Lindsey and Mayberry on February 18, 1965 (R. 19a-21a, 79, 80). The Commissioner used an estimated total of $200,000 cash at December 31, 1963 (R. 21a, 79).

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[2]Trooper Cromer had consistently raided the taxpayer, having made 24 raids on the taxpayer from 1957 through February 18, 1965 and the instant record reveals no evidence of any violation of any Federal, including untaxed whiskey, law by the taxpayer during the years 1942 to February 18, 1965 (R. 76a, 77a, 278a-280a, 289a).

The taxpayer filed a petition in the United States Tax Count contesting the deficiencies in the statutory notice (R. 7a).

At sometime prior to the trial in the United States Tax Court held April 23 and 24, 1969, the original county affidavit and search warrant for the search of taxpayer's home on February 18 had disappeared from the Harlan County Judge's office (R. 179a, 180a, 262a).

At the start of the trial in the Tax Court, the taxpayer requested the rule (R. 134a). The Commissioner however insisted that his witnesses remain in the courtroom because he said it would be helpful if they heard the others testify (R. 135a). At the start of the trial, counsel for the taxpayer established by the Harlan County Clerk that the original affidavit and search warrant were not available in the records of Harlan County for production in the Tax Court trial (R. 179a, 180a, 262a). However, unknown to the state troopers and others[3] taxpayer's counsel had in his possession photostats of the original affidavit and search warrant issued on February 18, 1965 (R. 286a, 287a).

Neither the originals nor copies of the county affidavit and search warrant were produced and introduced at the trial in Tax Court by the Commissioner through his or any other witness (Entire Record).

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[3](R. 286a)
"Q. I'll ask you if this is a copy of the search warrant that you served?
"A. That's it.
"Mr. Bagby: We'd like to offer this into evidence as Petitioner's Exhibit.
"Mr. Feeley: Again I'd like Mr. Bagby to furnish me a copy of that.
"Mr. Bagby: Don't you have a copy of this?
"The Witness: No, sir, we don't make copies of them."

During the Tax Court trial, trooper Cromer, as a government witness, testified on direct that trooper Roy Lindsey made the purchase of alcoholic beverages on February 17, 1965 at taxpayer's home and that this purchase was the basis for the search warrant issued by the county judge on February 18 and basis for the search for alcoholic beverages on that date of taxpayer's home. Cromer's testimony was as follows (R. 261a):

> "A. The raid was initiated on a *search warrant obtained by Trooper Lindsey after a purchase of alcohol* had been made from those premises." (Emphasis supplied.)

Trooper Cromer's report to headquarters also read as follows (R. 131a):

> "* * * *The warrant was issued as a result of a purchase of alcoholic beverages made by Trooper Roy Lindsey.* Harlan County Judge Acey Cornett issued the warrant earlier on the day it was executed." (Emphasis supplied.)

Trooper Cromer in his official report to his state headquarters stated that he personally received the search warrant and that the raid began at approximately 4 p.m. (R. 125a-127a, 261a). He testified that he was in charge of the raid and that he was responsible for the detailed report of the raid and that it was he who decided to use nine men to swoop down swiftly though he anticipated no trouble and had never had any trouble on prior raids (R. 125a-133a, 262a, 276a, 285a, 326a, 333a). Trooper Cromer had been garri-

soned in Harlan all of his 8¾ years with the state police whereas troopers Lindsey and Mayberry were garrisoned 130 miles away in Richmond, Kentucky and were in Harlan on special detail (R. 127a, 260a, 261a, 288a).

On cross-examination, trooper Cromer was surprised when taxpayer's counsel confronted him with a photostat of the affidavit made by trooper Mayberry (R. 287a). Thereupon Cromer refused to recognize this affidavit and testified that he had no personal knowledge of it but that he knew there was one on file but he had never seen it (R. 287a). This affidavit by trooper Mayberry, as previously stated herein, was sworn to before the county judge, and stated that *Mayberry* had *"information"* from a *"Charles Young"* that he, Charles Young on February 17, 1965 had purchased alcoholic beverages at taxpayer's residence (R. 116a). Although trooper Cromer testified that he did not know "Charles Young" and that he was not acquainted with trooper Mayberry's signature yet he testified that the "George Mayberry" on the affidavit was *the trooper* George Mayberry (R. 287a, 288a). Both the search warrant and the Mayberry affidavit had the same date, and the blanks were in the same distinctive handwriting and both with the county judge's signature (R. 114a, 116a). The affidavit was introduced in evidence by taxpayer's counsel without objection by the Commissioner (R. 288a, 289a).

Just previously on cross-examination at the Tax Court trial, trooper Cromer had quickly and gladly recognized the search warrant and indicated an anxiety

to prove that he had legal authority for the raid on taxpayer's home (R. 286a). The warrant had been served by trooper Cromer on taxpayer's brother and Cromer had made the return of the search warrant to the county judge (R. 114a, 115a, 286a, 287a).

One of the determining issues in this net worth civil income tax trial was whether or not the taxpayer had $200,000 at the end of 1963 (R. 19a-21a, 79). The Commissioner's *only* evidence as to this $200,000 was the testimony of his witness, trooper Cromer, who testified, on direct examination, to the details of the count on February 18 and said that the grand total of money found and counted was $206,909 (R. 268a, 274a, 275a, 79).

At the very start of trooper Cromer's testimony about the count of the money, taxpayer's counsel made a timely and prompt objection to any evidence about the trooper's count of the money on the ground that such evidence was in violation of taxpayer's rights under the Constitution and not within the realm of the search warrant for alcoholic beverages (R. 267a, 268a).

As heretofore stated, the taxpayer's money in bills from her footlocker found by the troopers was in a small jewelry box (8″ x 12″ x 4″ deep), and in 4 or 5 sized 8 pound grocery bags, in an old sock (or cloth) (about 2 to 3″ round) and some in a 1948 newspaper (R. 270a, 296a, 327a, 337a, 339a). The bills in the small jewelry box were in packets or bundles lengthwise (not folded) with a rubber band around each (R. 296a, 297a, 327a, 328a, 330a, 354a). The bills from the grocery

bags were in folds, folded over in the center, and held tight with a rubber band (R. 329a, 330a). The bills from the sock (or cloth) were in rolls with each held tight by rubber bands (R. 337a, 341a).

The denominations of the bills in the packets, folds, and rolls were 1's, 5's, 10's and 20's (R. 331a, 346a, 355a). Each packet, fold and roll consisted of "mixed-up" bills totalling $100 (R. 273a-275a, 297a, 329a, 330a, 354a). That is, each packet, fold and roll consisted of bills totalling $100 not of one denomination but of "mixed-up" denominations of 1's, 5's, 10's and 20's (R. 299a-300a, 332a, 346a). The money was not systematically stacked with the same denominations within each packet, fold and roll; and like bills were not systematically stacked together within each packet.

Cromer testified that in his presence Troopers Mayberry and Lindsey counted bill by bill, every bill of the $206,909 of the rubber-fastened packets, folds and rolls of mixed-up bills of the 1's, 5's, 10's and 20's within two and one-half hours. This testimony on direct was as follows: (R. 268a, 269a, 271a)

> "A. They were sitting at the table observing the count.
>
> "Q. Did you observe all the money in the foot locker?
>
> "A. *I observed all that was counted.*" (Emphasis supplied.)
> (R.275a)
>
> "Q. Now you observed the counting. *Was every bill counted?*
>
> "A. It appeared to be as far as I could tell." (Emphasis supplied.)

However his testimony on cross-examination was as follows: (R. 297a, 298a)

> "Q. Did you observe them all the time they were doing this?
>
> "A. *Yes, sir, I sat there at the table and watched.*
>
> "Q. Did they take these bill by bill?
>
> "A. Well, it gets tiresome counting one particular way all the time, *but they counted each individual bill.*
>
> "Q. *Of the two hundred six thousand dollars?*
>
> "A. *Yes.*
>
> "Q. They didn't thumb through or just flip through and estimate?
>
> "A. No, they didn't estimate, to my knowledge now.
>
> "Q. But you're not sure of it?
>
> "A. No, what I saw them count they counted individually.
>
> "But you didn't see them count every bill?
>
> "A. Well, I think you can see the situation. *Now, I can't testify as to what they did.*" (Emphasis supplied.)

Trooper Cromer confessed, on cross-examination, that he could not swear to the accuracy of the alleged count by troopers Mayberry and Lindsey (R. 299a). Although obviously present at the courthouse during the first day of the Tax Court trial for the purpose of testifying, after trooper Mayberry's affidavit was produced by taxpayer's counsel, troopers Mayberry and Lindsey apparently departed, as they were never called as witnesses (R. 203a, 204a, 300a, 379a).

The taxpayer's brother and the woman housecleaner, who viewed the count, testified only as rebuttal witnesses that the counters Lindsey and Mayberry spent three-fourths to one hour in the count and that they did not remove the rubber bands from any of the packets, folds and rolls and that the troopers did not count the money bill by bill (R. 330a, 341a, 342a, 355a, 356a, 364a).

The taxpayer testified that she returned to Harlan on the night of February 20 and that the first thing she did was to make a careful count of the money in the footlocker and that there was $116,300 in cash, of which $100,300 belonged to her and $10,000 belonged to her sister and $6,000 to her mother (R. 225a, 242a-244a, 312a, 313a, 364a, 365a). She further testified that on December 31, 1963, she had cash on hand which was about $1,000 to $2,000 more or less than the $100,300 (R. 365a). The taxpayer had no checking, savings, or other bank accounts as she distrusted bank's after she lost some money from a bank closing in the 1930's but kept all her savings in cash at home (R. 239a, 310a, 315a). In 1944 she had savings in cash at home of $80,000 (R. 238a, 239a, 259a, 371a, 379a, 382a). Other than her cash savings, her only other worldly possessions, during the years 1945 to 1963, were the barest of clothes, an insignificant inventory of alcoholic beverages, plus nominal furniture most of which furniture was purchased in 1963, having owned none of any value until 1957 (R. 223a, 224a, 371a, 374a, 380a).

Not only was the taxpayer well thought of in her community of Harlan, Kentucky but she has a good reputation for truth and veracity R. 143a, 182a).

The taxpayer was never arrested for or charged with any criminal violation, State or Federal, as the result of the raid on February 18 (R. 126a, 128a, 289a). Further, the taxpayer was held not to be guilty of any civil income tax fraud in connection with any of the income tax years involved in the instant case (R. 388a, 389a).

The evidence of the seizure and count of the money, presented through the testimony of trooper Cromer and his tally, was allowed by the United States Tax Court and this was the sole basis for the Tax Court's holding that the taxpayer had $206,909 in the foot-locker on February 18, 1965 (R. 379a). The Court of Appeals for the Sixth Circuit affirmed the Tax Court decision by stating, without more, that the law was properly applied and that the Tax Court's factual determinations were supported by substantial evidence (Appendix A, *infra*, p. 33).

REASONS FOR GRANTING THE WRIT.

1. The decision below is in conflict with the Fourth Amendment of the Constitution and with the exclusionary rule enunciated in *One Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693, 14 L. Ed. 2d 170, 85 S. Ct. 1246; *Elkins* v. *United States,* 364 U. S. 206, 4 L. Ed. 2d 1669, 80 S. Ct. 1437; *Weeks* v. *United States,* 232 U. S. 383, 58 L. Ed. 652, 655, 34 S. Ct. 341; *Boyd* v.

United States, 116 U. S. 616, L. Ed. 746, 6 S. Ct. 524; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 64 L. Ed. 319, 40 S. Ct. 182; *Mapp* v. *Ohio,* 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684; *Jones* v. *United States,* 357 U. S. 493, 2 L. Ed. 2d 1514, 78 S. Ct. 1253; *Gouled* v. *United States,* 255 U. S. 298, 309-311, 65 L. Ed. 647, 41 S. Ct. 261; *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 75 L. Ed. 374, 51 S. Ct. 153; *United States* v. *Lefkowitz,* 285 U. S. 464, 76 L. Ed. 882, 52 S. Ct. 420; *United States* v. *Jeffers,* 342 U. S. 48, 51, 96 L. Ed. 59, 64, 72 S. Ct. 93; *Rios* v. *United States,* 364 U. S. 253, 261, 4 L. Ed. 2d 1688, 1693, 80 S. Ct. 1431; *Stoner* v. *California,* 376 U. S. 483, 11 L. Ed. 2d 856, 84 S. Ct. 889; *Agnello* v. *United States,* 269 U. S. 20, 70 L. Ed. 145, 46 S. Ct. 4.

In *One Plymouth Sedan* v. *Pennsylvania, supra,* certiorari was granted to consider the important question of whether the exclusionary rule enunciated in *Weeks* v. *United States, supra,* and *Mapp* v. *Ohio, supra,* applied in quasi-criminal forfeiture proceedings where there was conflict in both state and federal decisions. The Court said in this case:

> "As this Court has acknowledged, '(t)he leading case on the subject of search and seizure is Boyd v. United States. * * *.' Carroll v. United States, * * *. See Mapp v. Ohio, supra, * * *. Boyd v. United States * * *, itself was not a criminal case but was a proceeding by the United States to forfeit 35 cases of plate glass which had allegedly been imported without payment of the

customs duty. * * * The question before the Court in Boyd was whether the compulsory production of a man's private papers for their evidentiary use against him in a proceeding to forfeit his property for alleged fraud against the revenue laws constituted an unreasonable search and seizure within the meaning of the Fourth Amendment of the Constitution. In holding that the Fourth Amendment applied and barred such attempted seizure, Mr. Justice Bradley, for the Court stated:

> 'We are clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. * * * If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession, of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one . . . . As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution . . . .' "

This Court further said in Plymouth:

> "Finally as Mr. Justice Bradley aptly pointed out in Boyd, a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law. * * *"
>
> * * * * * * *
>
> "It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible. * * *"

Is it not true that—had an attempt been made to introduce the evidentiary materials, seized by the three state officers in the instant case, in a criminal trial of the taxpayer, they would have been inadmissible by reason of not only the Fourth Amendment but the Fifth Amendment as well—and that therefore there is a question here?

This Court in the *Elkins* case, *supra,* said:

> "We granted certiorari, 361 U .S. 810, 4 L. Ed. 58, 80 S. Ct. 61, to consider a question of importance in the administration of federal justice. The question is this: May articles obtained as the result of an unreasonable search and seizure by state officers, without involvement of federal officers be introduced in evidence against a defendant over his timely objection in a federal criminal trial?"

This Court in the *Elkins* case further said:

> "To put the issue in historic perspective, the appropriate starting point must be *Weeks* v. *United States* * * *, decided in 1914. It was there that the Court established the rule which excludes in a federal criminal prosecution evidence obtained by federal agents in violation of the defendant's Fourth Amendment rights. The foundation for that decision was set out in forthright words:
>
> "'The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. * * *'"

In the *Jones* case, *supra,* this Court said that "it is settled doctrine that probable cause for belief that certain articles, subject to seizure, are in a dwelling cannot of itself justify a search without a warrant" (357 U. S. 493, 497). This Court said also (347 U. S. 493, 498)—

> "* * * Were Federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the

provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified."

The decision below is in conflict with the First Circuit in the case of *Rogers* v. *United States,* 97 F. 2d 691 (C.C.A. 1, 1938) and the Seventh Circuit in the case of *Knoll Association, Inc.* v. *Federal Trade Commission,* 397 F. 2d 530 (C.C.A. 7, 1968) and *United States* v. *Five Thousand Six Hundred Eight Dollars and Thirty Cents, etc.,* 326 F. 2d 359 (C.A. 7, 1964) and the Second Circuit Court case of *Pizzarello* v. *United States, et al.,* 408 F. 2d 579 (C.A. 2, 1969). See the First Circuit case of *Berkowitz* v. *United States* (C.A. 1, 1965) 340 F. 2d 168, and the Tenth Circuit Court case of *United States* v. *One 1941 Mercury Sedan,* 156 F. 2d 897.

See the cases of *Ex parte Jackson,* 263 F. 110 (D.C. Mont. 1920) appeal dismissed; *Andrews* v. *Jackson,* 267 F. 1022 (C.A. 9); *Tovar* v. *Jarecki,* 83 F. Supp. 47 (N.D. Ill. 1948), reversed on other grounds 173 F. 2d 449 (7th Cir. 1949); *Powell* v. *Zuckert,* 366 F. 2d 634 (D.C. Cir. 1966); *Schenck* v. *Ward,* D. C. Mass., 24 Supp. 776; *Hugo Romanelli,* 54 T.C. 1448.

The First Circuit Court in *Rogers* v. *United States, supra,* held that evidence from an illegal search was not admissible in a civil case by the Federal government to recover custom duties on liquors imported. The court, relying on *Silverthorne Lumber Company* v. *United States, supra,* held that where evidence is obtained by the government in violation of the Fourth Amendment, such renders a judgment in a civil case invalid.

The *Berkowitz* case, *supra*, was a civil action in libel for forfeiture of money allegedly intended for use in violation of revenue laws. The First Circuit Court held that the Federal government was not permitted to enforce a forfeiture under internal revenue laws where the money was discovered and seized through the violation of the taxpayer's constitutional rights.

The case of *United States* v. *Five Thousand Six Hundred Dollars and Thirty Cents, etc., supra*, was libel for forfeiture of money seized from persons allegedly operating a bookmaking business for failure to pay the special tax or registering with the internal revenue. The Seventh Circuit Court held that the proceeding, though technically a civil action, was of quasi-criminal nature and that the question was covered by the Fourth Amendment.

The Seventh Circuit case of *Knoll Associates, Inc.* v. *Federal Trade Commission, supra*, was a proceeding to review an order of Federal Trade Commission for the petitioner to cease and desist practicing violations of the Clayton Act. The unreasonable search and seizure by the theft of petitioner's documents violated the Fourth Amendment and their use as evidence was denied as it was held that the proceeding was quasi-criminal. The court said:

> "We hold that we have not only the power but the duty to apply constitutional restraints when pertinent to any proceeding of which we have jurisdiction, such as a statutory review of a federal Commission decisions."

In the Tenth Circuit Court the case of *United States* v. *One 1941 Mercury Sedan, supra,* was in a libel to forfeit for transporting untaxed whiskey. Where city traffic ordinances were violated and the defendants arrested and their car searched for Federal law violations, the Circuit Court said:

> "And inasmuch as the police officers were not undertaking to enforce any law of the city or state but solely to aid in the enforcement of Federal law, the search and seizure violated the Fourth and Fifth Amendments and therefore the evidence was properly suppressed."

2. The decision below is in conflict with the principles of this Court enunciated in *Agnello* v. *United States, supra,* and as was stated in *Walder* v. *United States,* 347 U. S. 62, 98 L. Ed. 503, 74 S. Ct. 354, there is presented a novel aspect of the scope of *Weeks* v. *United States, supra.* The Court said in Walder:

> "* * * The question which divided that court, and the sole issue here, is whether the defendant's assertion on direct examination that he had never possessed any narcotics opened the door, solely for the purpose of attacking the defendant's credibility, to evidence of the heroin unlawfully seized in connection with the earlier proceeding. Because this question presents a novel aspect of the scope of the doctrine of *Weeks* v. *United States* * * *"

3. Assuming *arguendo* that the three state troopers made their search and seizure of taxpayer's money under the authority of the county search warrant, the

affidavit was insufficient for the issuance of the county search warrant since it was a void search warrant, the search and seizure was an unreasonable search . . . and was in conflict with the Fourth Amendment . . . and is contrary to *Grau* v. *United States,* 287 U. S. 123, 53 S. Ct. 38; *Byars* v. *United States,* 273 U. S. 28, 71 L. Ed. 520, 47 S. Ct. 248; *Nathanson* v. *United States,* 290 U. S. 41, and the Supreme Court cases cited in the question of unreasonable search and seizure.

This Court stated in the *Grau* case, *supra:*

> "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury * * *; and would lead a man of prudence and caution to believe that the offense has been committed. * * * Tested by these standards the affidavit was insufficient. * * *"
>
> * * * * * * *
>
> "While a dwelling used as a manufactory or headquarters for merchandising may well be and doubtless often is the place of sale, its use for those purposes is not alone probable cause for believing that actual sales are there made."

The search warrant was in conflict with Rule 41 of the Rules of Criminal Procedure and Kentucky law.[4]

4. The record reveals an obvious and exceptional showing of error and it was so devoid of evidentiary support of the ruling that the taxpayer had $206,909

[4]The Kentucky Court of Appeals has held that an affidavit for a valid search warrant which is based upon information obtained from others must disclose the names of the informant. *Brewer* v. *Commonwealth,* 234 S. W. 2d 956, 314 Ky. 269 and *Carroll* v. *Commonwealth,* 181 S. W. 2d 259, 297 Ky. 748.

in cash on February 18, 1965 that it is so in conflict with due process under the Constitution—that it presents a substantial question for the Court. *Graver Tank and Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U. S. 271, 193 L. Ed. 672; *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275 88 L. Ed. 721, 64 S. Ct. 593; *District of Columbia* v. *Pace*, 320 U. S. 698, 88 L. Ed. 408, 64 S. Ct. 406; *Williams Mfg. Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 86 L. Ed. 1537, 62 S. Ct. 1179; *Baker* v. *Schofield*, 243 U. S. 114, 118, 61 L. Ed. 626, 630, 37 S. Ct. 333; *Thompson* v. *City of Louisville*, 362 U. S. 199.

CONCLUSION.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM R. BAGBY
1107 First National Building,
Lexington, Kentucky 40507
Counsel for Petitioner

July, 1971

APPENDIX A.

1. OPINION OF THE COURT OF APPEALS.

No. 20,729

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MAGGIE BAILEY,
Petitioner-Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

APPEAL from the Decision of the United States Tax Court.

Decided and Filed April 27, 1971.

Before: MCCREE, BROOKS and MILLER, Circuit Judges.

PER CURIAM. This appeal is from a decision of the Tax Court of the United States which determined a deficiency in the taxpayer's income for the years 1945 through 1963. The memorandum, findings of fact and opinion of law of the Tax Court are reported at P-H Memo T.C., par. 70,064. We have considered the record, the briefs of the parties and oral arguments of counsel, and conclude that the Tax Court's factual determinations are supported by substantial evidence and that the law was properly applied.

The decision of the Tax Court is affirmed.

2. JUDGMENT OF THE COURT OF APPEALS.

Filed April 27, 1971

Before: McCree, Brooks and Miller, Circuit Judges.

On appeal from the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby affirmed.

It is further ordered that Respondent-Appellee recover from Petitioner-Appellant the costs on appeal, as itemized below.

Entered by order of the Court.
(s) Carl W. Reuss
Clerk

3. REHEARING DENIED BY COURT OF APPEALS.

Filed May 28, 1971

Before: McCree, Brooks and Miller, Circuit Judges.

The motion for rehearing filed by the petitioner-appellant, Maggie Bailey, has been considered and it is Ordered denied.

Entered by order of the Court
(s) Carl W. Reuss
Clerk

APPENDIX B.

AMENDMENTS INVOLVED.

Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or Public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

RULES OF CRIMINAL PROCEDURE.

Rule 41. Search and Seizure

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that

they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.